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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 977.

GEORGE S. ALLEN, TRUSTEE OF THE ESTATE OF ASH TRUCK LINES, INC., PETITIONER,

VS.

UNION TRANSFER COMPANY, A CORPORATION, DOING BUSINESS AS UNION FREIGHTWAYS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

LOUIS R. GATES,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered December 24, 1945 (R. 69), affirming a judgment entered by the District Court on Review (R. 54, 55), setting aside and vacating the following orders of the Referee in Bankruptcy:

(a) setting aside the sale of the assets on December 18, 1944, to The Union Transfer Company for $4,250 and the Order of confirmation thereof;

(b) directing the resale of the assets;

(c) The sale of the assets on January 31, 1945, to Watson Bros. Transportation Company for $9,050 and the order of confirmation thereof.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The Referee in Bankruptcy set aside the confirmed sale of the principal asset of the Bankrupt for $4,250, upon finding that sale price to be grossly inadequate, and that asset was resold by the Trustee in Bankruptcy for $9,050 and that sale was confirmed by the Referee.

The Referee made extensive and detailed Findings of Fact at the time the original sale was set aside and the second sale was had (R. 16-20).

They were adopted as the Court's Findings of Fact by the District Court on Review (R. 51) but the District Court concluded that the Referee exceeded his discretionary powers (R. 54). Judgment was entered accordingly (R. 54-55). Trustee in Bankruptcy appealed (R. 59-60).

The original sale was made on December 18, 1944, at the first session of the first meeting of creditors (R. 4). On January 31, 1945, that sale was set aside and assets resold at the recessed session of the first meeting of creditors (R. 9).

Bankrupt, Ash Truck Lines, Inc., was a motor carrier, operating under intrastate and interstate permits in Nebraska, Kansas and Missouri (R. 44).

Ash Truck Lines was adjudicated a Bankrupt on November 24, 1944 (R. 17).

At the first session of the first meeting of Creditors, the State Corporation Commission of Kansas filed its claim for mileage tax in the amount of $297.64 and asserted that it was a first and prior claim under Sec. 66-1124, G. S. Kan., 1943 Supp. (R. 7).

Facts Confronting Referee When Sale Set Aside and New Sale Ordered.

The principal asset of the bankrupt consisted of the operating rights mortgaged for $3,143.03 (R. 6), claims of secured creditors were listed at $7,946.23 (R. 6), prior claims were listed at $2,174.68 (R. 5), unsecured claims were listed at $11,578.95 (R. 6), operating rights had been appraised at $7,500, and there had been no operation of the truck lines of the bankrupt since October 17, 1944 (R. 7).

Sale of the principal asset had been made December 18, 1944, for $4,250 to Respondent (R. 17).

The State Corporation Commission of Kansas had threatened cancellation of the operating rights since December 18, 1944 (R. 34), and had issued citation to show cause why they should not be cancelled and the attorney for respondent had been continuously notified of the hearing on the citation to show cause order (R. 34-35) and the Corporation Commission this date was still insisting upon cancellation unless the mileage tax was paid forthwith (R. 7, 34, 12).

The Trustee in Bankruptcy had no funds on hand with which to pay the mileage tax and no asset from which the mileage tax could be realized other than by the sale of the operating rights.

The payment of the mileage tax could not be made by the Trustee in Bankruptcy from and out of the $4,250 deposited by the respondent at the first sale for the reason that the contract of sale, clause 6, provided that the Trustee in Bankruptcy would retain said sum of $4,250

> "in escrow until such time as the Interstate Commerce Commission enters an order authorizing the purchase herein agreed upon and said order becomes finally effective and permanent. Authority to operate the above described routes and territories is finally vested in the purchaser, and approval of the transfer by the Corporation Commission of Kansas at which time said escrow agreement shall cease and determine and the full sum of $4,250 become the sole and separate property of the above named Trustee" (R. 42).

Notwithstanding the Respondent had knowledge since December 18, 1944, of the threatened cancellation of the operating rights, nevertheless the Respondent had failed, refused and neglected to advance the sum sufficient to pay the mileage tax (R. 7, 34, 35) and the respondent had not filed an application for the transfer of the operating rights (Referee Finding of Fact 11, R. 19).

On January 6, 1945, some nineteen days after the first sale a deposit of $6,250 had been made with the Trustee in Bankruptcy as a firm bid if the bidding were reopened (R. 18).

On January 29, 1945, applications of two nationally known creditors, Consolidated Builders Supply Company of Omaha, and J. I. Case Company of Kansas City, seeking to set aside the sale were filed and likewise their claims were filed.

Said applications showed that said creditors had no notice of the sale of the operating rights or of the first meeting of creditors and had no knowledge of the bankruptcy proceedings until after January 1, 1945, and that

if the former sale should be set aside that bids higher than the sum of $6,250 already on deposit would be made, and that if the former sale remained in effect and the first mortgage on the operating rights should be paid and the costs of administration were paid, that then and in that event the moving creditors would receive no payment of their claims, and that in the event bids were reopened and a higher sum as above indicated, received, that the creditors would receive payment of their claims (R. 8-9).

Notice had been given to the respondent that at this recessed session of the first meeting of creditors, these applications to set aside the sale would be heard (R. 3) and the attorney for respondent at the opening of the recessed session of the first meeting of creditors made the following statement to the creditors and Referee in Bankruptcy:

> "The Court has here a highly perishable asset which is subject to being revoked by the Kansas State Corporation Commission for abandonment, and more delay in these hearings may make the property totally valueless and worthless to any purchaser" (R. 11).

Other portions of the statement are elsewhere set out (R. 3).

The Referee at the opening of the recessed session of the first meeting of creditors made the following statement to the creditors:

> "I would say in addition to that, that there should be no distribution of money to any of the creditors until the matter is finally consummated, or unless through some fault of the purchaser the matter is not consummated, except that this tax money ought to be paid. I have this suggestion to make to the creditors, I do think the taxes should be paid in order to get the transfer.

> We may be subrogated to the rights of the State, but of that I am not sure. However it seems to me that we are required to pay the taxes in order to protect ourselves. I rather think the State has kind of the whip-hand. I would feel that way if I was on the commission but it is a very nice question" (R. 12).

Thereupon the hearing on said applications to set aside the sale was held and the two creditors proved that they had no notice of the first meeting of creditors or the sale and had no knowledge of the bankruptcy proceedings until after January 1, 1945, and the details of acquiring knowledge are set out (Referee Findings of Fact 8, 9, R. 18).

At the hearing to set aside the sale, three witnesses testified that they were there prepared to forthwith make bids substantially in excess of $6,250 which was already on deposit, and that each qualified as being a motor carrier operating in excess of 17 and 20 motor vehicles respectively, and one bidder was a practicing lawyer, bidding for an undisclosed principal, but stating his client was a motor carrier operating in excess of 17 vehicles (R. 11).

The evidence offered on behalf of the respondent is summarized in referee's finding of fact 11 (R. 19).

Thereupon the Referee found the sale price grossly inadequate (R. 19) and set aside the former sale for $4,250, ordered a new sale, and spirited and competitive bidding at auction immediately began. The operating rights were sold for $9,050 and that sale confirmed. Referee Finding of fact 15 (R. 20).

The Referee in Bankruptcy obtained an agreement from the purchaser at the second sale that the mileage tax to the Kansas Corporation Commission in the amount of $297.64 could be paid and under no circumstances to be refunded to the purchaser, Referee finding of fact 16 (R. 20).

The Referee ordered and directed the trustee to forthwith return to the respondent, the said sum of $4,250 (R. 22).

The Referee further ordered that upon the consummation of the sale for $9,050 that a hearing be held upon notice for the purpose of determining what amount, if any, in excess of the purchase price of $4,250 should be refunded to the respondent in order to restore it to its former status (R. 23).

II.

JURISDICTION.

The judgment of the Tenth Circuit Court of Appeals was entered December 24, 1945 (R. 69), and the opinion is reported in 152 F. 2d 633.

The jurisdiction of this Court is invoked under Section 240 of the judicial code, as amended by the Act of February 13, 1925 (Title 28, U. S. C., Sec. 347).

The opinion of the District Court is set out (R. 55-9).

The date of this petition for certiorari is March 18, 1946.

III.

QUESTIONS PRESENTED.

1. Where gross inadequacy of price is found to exist by the Referee in Bankrupcty and also so found by the District Court on Review, and the gross inadequacy was such as to shock the conscience of the Referee in Bankruptcy to the extent that such Referee set aside the confirmed sale made at such grossly inadequate price of $4,250, and ordered a resale resulting in a sale price of $9,050, may the District Court on Review, having adopted

all the Referee's findings as the findings of fact of the Court, including such finding of gross inadequacy of price as aforesaid, determine that such gross inadequacy of price does not shock the conscience of the Court and therefore conclude that the Referee in Bankruptcy abused his discretion in setting aside the confirmed sale?

2. Where the Circuit Court of Appeals has before it a record wherein the trial court adopted the findings made by the Referee and the issue presented is one of law, viz. —Did the Referee abuse his discretion in setting aside the original sale and the confirmation thereof—may the Circuit Court of Appeals, for the reason that the gross inadequacy of price did not shock the conscience of the District Court, therefore conclude that as a matter of law the Referee in Bankruptcy abused his discretion in setting aside the original sale and confirmation thereof?

3. Where gross inadequacy of price has been found to exist by the Referee in Bankruptcy and by the District Court on Review and the gross inadequacy was such as to shock the conscience of the Referee in Bankruptcy to the extent that such Referee set aside the confirmed sale made at such grossly inadequate price of $4,250 and ordered a resale resulting in a sale price of $9,050 and where the District Court on review adopted all the Referee's Findings as the findings of fact of the Court, including such finding of gross inadequacy of price as aforesaid, may the Circuit Court of Appeals consider the question of whether or not the conscience of the Referee in Bankruptcy was shocked as being a question of law only and therefore determine that since the conscience of the District Court is not shocked, that as a matter of law, the Referee in Bankruptcy abused his discretion in setting aside the sale made at such grossly inadequate price?

4. Under the facts and circumstances of this case confronting the Referee in Bankruptcy when the Referee set aside the original sale and ordered a new sale, is the decision of the Circuit Court of Appeals, on an important question of the administration of the Bankruptcy Act, that the Referee in Bankruptcy abused his discretion, in conflict with the decision of this Court in *Langnes* v. *Green*, 282 U. S. 531, 541, wherein discretion is defined?

5. In the administration of the Bankruptcy Act does the Referee in Bankruptcy owe the duty to the creditors seeking the assistance of a Court of Bankruptcy in subjecting property to the payment of debts, to see that the property brings something like its true value, and the duty to do something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act?

6. Should the rule of practice prevail giving the referee or judge plenary control of its judgments and orders during the pendency of the bankruptcy proceedings and within 6 months after the entry of any judgment or order, or should the administration of the Act be restricted and hampered by application of rule of practice denying the referee or judge control of judgments and orders, except for causes which would be sufficient after expiration of the term or six months?

IV.

REASONS FOR GRANTING THE WRIT.

1.

Because the decision of the circuit court of appeals was on an important question of federal law and probably is in conflict with the decisions of this court in the following cases:

Langnes v. *Green*, 282 U. S. 531, 541.
Graffam v. *Burgess*, 117 U. S. 180, 192.
Gelfert v. *National City Bank*, 313 U. S. 221, 231, 232.

The decision of the Circuit Court of Appeals was on an important question of Federal law, viz., the Bankruptcy Act.

The Circuit Court of Appeals held that the Referee in Bankruptcy abused his discretion in setting aside the original sale and the confirmation thereof.

The Circuit Court of Appeals so found upon a Record wherein the Referee made extensive and detailed findings of fact at the time the original sale was set aside and the second sale was had (R. 15-20), and the District Court on review adopted them as the findings of fact of the Court (R. 51).

Both the Referee and the District Court on review found that the sale price at the original sale, $4,250 was grossly inadequate (R. 19 and 51). The sale price at the second sale was $9,050 (R. 22).

The grossly inadequate price shocked the conscience of the Referee to the extent that he set the sale aside and ordered a new sale.

The District Court, on review after adopting all the findings of fact of the Referee, in his opinion (R. 57)

stated: "The Referee found, upon considering the petition to set this sale aside, that the bid at the original sale was grossly inadequate. But he failed to find that there were any suspicious circumstances in the conduct of the sale."

From this the District Court on review concluded erroneously that the rule of law applicable in the case at bar was in substance that a finding of gross inadequacy of price must also be accompanied by a finding of suspicious circumstances in the conduct of the sale.

It was upon the application of this erroneous rule of law, that the District Court on review held that the Referee abused his discretion.

The Circuit Court of Appeals correctly stated the rule of law, viz.: That mere inadequacy of price unaccompanied by any facts showing unfairness in the sale or raising any doubt as to the integrity of the sale would not justify setting aside the sale, but the Circuit Court of Appeals applied that rule erroneously in the case at bar, completely ignoring the finding of gross inadequacy of price by the Referee and the adoption of that finding as the finding of the District Court on review.

The Circuit Court of Appeals in view of the finding of gross inadequacy of price by the Referee and the adoption of that finding by the District Court on review, should have applied the rule that equity will set aside a sale if the inadequacy is so great as to shock the conscience.

This Court has held that:

> "It is quite uniformly the rule in this country, as in England, that while equity will not set aside a sale for mere inadequacy of price, it will do so if the inadequacy is so great as to shock the conscience * * *"
>
> *Gelfert* v. *National City Bank*, 313 U. S. 221, 232.

This Court has held:

> "From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or * * *" (*Graffam* v. *Burgess*, 117 U. S. 180, 192).

The District Court on review did not find that the Referee had reached his conclusion arbitrarily, capriciously or in the misapplication of any rule of law and therefore had abused his discretion.

This Court has defined discretion in the following language:

> "The term discretion denotes the absence of a hard and fast rule (citations). When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result" (*Langnes* v. *Green*, 282 U. S. 531, 541).

What other steps should the Referee have taken to make his action "right and equitable under the circumstances and the law"?

The discretion of the Referee was "directed by the reason and conscience of the judge to a just result."

In the light of subsequent events as shown by the record, namely that instead of $4,250 the sum of $9,050 was obtained, can the Court say that the Referee abused his discretion in setting aside the sale and confirmation and ordering a resale of the property?

There was not a scintilla of evidence in the record tending to show any increase in market value of the operating rights of the bankrupt between the date of the first sale, to-wit: December 18, 1944, and the date of the second sale, to-wit: January 31, 1945.

In the case at bar, the sale was of operating rights of the bankrupt truck lines and it was a judicial sale.

This Court has held with reference to judicial sales of realty:

> "The control of judicial sales of realty by courts of equity and by legislatures in order to prevent sacrificial prices has a long history (citations) * * * We mention these matters here because they indicate that for about two centuries there has been a rather continuous effort either through general rule or by appeal to the chancellor in specific cases to prevent the machinery of judicial sales from becoming an instrument of oppression" (*Gelfert* v. *National City Bank*, 313 U. S. 221, 231, 232).

2.

Because the decision rendered by the circuit court of appeals is in conflict with the decision of the Eighth Circuit Court of Appeals on the subject of judicial discretion in the following case:

Currin v. *Nourse*, 66 F. 2d 137 (Eighth Circuit).

In the case of *Currin* v. *Nourse*, 66 F. 2d 137, decided by the Circuit Court of Appeals, Eighth Circuit, opinion by Circuit Judge Sanborn, Syl. 6 reads:

> "6. Bankruptcy—264, 269. Referee's denial of opportunity for bankrupt's unsecured creditors to examine contract for sale of bankrupt's property and be heard fully on question of confirming sale held abuse of power, necessitating reversal of orders confirming sale, denying motion to set aside confirmation, and allocating proceeds."

The facts were that at a general meeting of creditors, attended by appellant creditors, the trustee reported that he had entered into a contract to sell the assets to Stern

Bros. No creditor knew of the terms or conditions of the contract of sale nor the price to be paid until the meeting.

In the opinion on page 139 appears the following:

> "The appellants at once requested an opportunity to examine the contract before the sale was confirmed, and to be heard upon the question of confirmation. The trustee was not then able to furnish copies of the contract, but offered to deliver copies on the following day. The referee denied the request for a continuance, refused to postpone confirmation and entered his order approving the sale. * * * On February 18, 1933, the appellants moved that the order confirming the sale be vacated on a number of grounds. They offered to show * * * that the price was inadequate; that the order of confirmation was made without an adequate opportunity for investigation or an adequate opportunity to be heard being afforded them. The referee sustained objections to their offers of proof, and their motion was denied. A petition for the review of each order was duly filed. * * * District Court Judge confirmed the orders of the referee. Thereafter, upon application to this court, appeals were allowed.
>
> "The appellants attack the order of confirmation and the other orders upon various grounds. The important question, we think, is whether the referee abused his discretion in confirming the sale of these properties to the purchaser under the circumstances and without granting to the appellants an opportunity for investigation and a hearing."

In the opinion on page 140 the Court said:

> "The referee should have granted to the unsecured creditors an opportunity to examine the contract of sale and have given them reasonable time to be heard with reference to its confirmation. * * * The unsecured creditors, therefore, were entirely de-

> pendent for the payment of their claims upon the amount received in excess of liens and were, hence, vitally interested in the price to be secured. * * * We think that, under all the circumstances, it was an abuse of power to deny the unsecured creditors an opportunity to be heard fully upon the question of the approval of the sale. The integrity of judicial sales is as important as their stability."

In the opinion on page 141 appears the following:

> "The orders appealed from are reversed. The cases are remanded, with directions that the appellants be given a full and fair opportunity to be heard upon the question of the confirmation of the sale."

The petitioner, in the case at bar, respectfully submits therefore, that the two unsecured creditors who moved to set aside the sale, were vitally interested in the price to be secured and had an indisputable claim upon the amounts received in excess of liens and costs of administration, and if they had received notice of the sale or had knowledge of the bankruptcy proceedings in time to have attended the sale, were entitled as unsecured creditors to have been heard fully upon the question of the approval of the sale and the price to be secured and especially to show that the price bid was grossly inadequate.

In the case at bar, the Circuit Court of Appeals for the Tenth Circuit has held it to be an abuse of discretion for the referee to permit unsecured creditors to be heard fully upon the question of the approval of the sale, whereas the Circuit Court of Appeals for the Eighth Circuit has held it an abuse of discretion for the referee to deny to the unsecured creditors such an opportunity.

3.

Because the importance of the questions relating to the administration of the Bankruptcy Act is such that this court should grant certiorari.

Ballentyne v. *Smith*, 205 U. S. 285, 289.
Continental Illinois National Bank and Trust Co. v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 675.
Birkett v. *Columbia Bank*, 195 U. S. 345, 350.
U. S. v. *Commercial Credit Co.*, 286 U. S. 63, 67.

It is important for the orderly administration of the Bankruptcy Act that the findings of the Referee in Bankruptcy on conflicting evidence remain undisturbed except for most extraordinary circumstances.

In the case at bar, the crucial question before the Referee was one of fact—Did the evidence show mere inadequacy of price which must be accompanied by evidence of circumstances throwing doubt on the integrity of the original sale, or did the evidence show gross inadequacy of price sufficient to shock the conscience of the Referee so that he could and should set aside the original sale?

The Referee found such gross inadequacy of price (R. 19), and the District Court on Review adopted that finding as the finding of the Court (R. 51).

The Circuit Court of Appeals decision ignored the finding of gross inadequacy of price by the Referee which shocked his conscience to the extent that he set aside the original sale and ordered a resale, and which finding of gross inadequacy was adopted as the finding of the Court.

The Circuit Court of Appeals decision rested basically on that Court's belief that mere inadequacy of price existed and therefore it would have to be accompanied by

circumstances throwing doubt on the integrity of the original sale.

From such belief the Circuit Court of Appeals held that the Referee abused his discretion in setting aside the original sale.

It is not the province of the Circuit Court of Appeals to review facts found by both the Referee and the District Court on Review and to conclude that mere inadequacy of price existed instead of gross inadequacy which shocked the conscience of the Referee, unless the Circuit Court of Appeals, from an examination of the entire record, makes the finding that there was no evidence in the record tending to support such findings of both the Referee and District Court.

No such finding was made by the Circuit Court of Appeals.

This Court has held:

> "These concurrent findings of the two Courts as this Court has often held, should be accepted as conclusive unless clearly erroneous."
>
> *Continental Illinois Nat'l Bank & Trust Co.* v. *C., R. I. & P. Ry. Co.*, 294 U. S. 648, 678.
>
> *U. S.* v. *Commercial Credit Co.*, 286 U. S. 63, 67.

Furthermore the Circuit Court of Appeals did not find that the Referee reached his conclusion arbitrarily, capriciously or in the misapplication of any rule of law.

The rule of law upon which the decision of the Circuit Court of Appeals rested does not apply to gross inadequacy of price which shocked the conscience of the Referee to the extent that the Referee set aside the original sale and ordered a resale.

Referee Owes a Duty to Creditors.

This Court has held that a Court of Bankruptcy is a court of equity (*Continental Illinois National Bank and Trust Co.* v. *Chicago, R. I. and P. Ry. Co.*, 294 U. S. 648, 675).

This Court has held, concerning the duty that a court of equity owes to creditors:

> "Something may be said on each side of the question; on the one, that a court of equity owes a duty to the creditors seeking its assistance in subjecting property to the payment of debts, to see that the property brings something like its true value in order that, to the extent of that value, the debts secured upon the property may be paid; that it owes them something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fraudulent act; on the other, that it is the right of one bidding in good faith at an open and public sale to have the property for which he bids struck off to him if he be the highest and best bidder; that if he be free from wrong he should not be deprived of the benefit of his bid simply because others do not bid, or because parties interested have done nothing to secure the attendance of those who would likely give for the property something nearer its value; that if the creditors make no effort, and are willing to take the chances of a general attendance, they have no right to complain on the ground that the property did not bring what it should have brought" (*Ballentyne* v. *Smith*, 205 U. S. 285, 289).

Hearing to Set Aside Sale.

The hearing was held upon the application of two unsecured creditors, to whom no notice of sale had been sent and who had no knowledge of bankruptcy proceedings until some two weeks or more after the sale for $4,250.

At the hearing to set aside the sale three witnesses testified they were prepared to forthwith make bids substantially in excess of $6,250 which was already on deposit, and that each qualified as being a motor carrier operating in excess of 17 and 20 motor vehicles, respectively (R. 11).

It is submitted that the two unsecured creditors who moved to set aside the sale, were vitally interested in the price to be secured and had an indisputable claim upon the amounts received in excess of liens and costs of administration, and if they had received notice of the original sale for $4,250 or had knowledge of the bankruptcy proceedings in time to have attended the sale, they were entitled as unsecured creditors to have been heard fully upon the questions of the approval of the sale and the price to be obtained—and especially to show that the price bid was grossly inadequate.

Notice of Sale Required by Act.

11 U. S. C. A. 94 (Sec. 58 of the Act) deals with notices to be given to creditors of the several more important steps in a proceeding under the Act.

Under subdivision (a) it is provided that creditors shall have at least 10 days notice by mail, to their respective addresses as they appear on the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of some eight classified steps in the proceedings.

Number 1 relates to examination of the bankrupt.

Number 4 relates to proposed sales of property.

Only Actual Knowledge on the Part of a Creditor Can Obviate the Necessity of a Notice Mailed to Him in Accordance with the Act.

This Court has defined actual knowledge of bankruptcy proceedings:

"Actual knowledge of the proceedings, contemplated by the section, is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate, or to deprive him of dividends. * * * That the law should give a creditor remedies against the estate of a bankrupt notwithstanding the neglect or default of the bankrupt is natural. The law would be, indeed, defective without them" (*Birkett* v. *Columbia Bank,* 195 U. S. 345, 350).

4.

Because the ruling of the United States Circuit Court of Appeals as to practice is erroneous and might tend to introduce confusion into the law.

Zimmern v. *U. S.,* 298 U. S. 167, 169.

This Court has granted certiorari to review a ruling as to practice that might tend, if erroneous, to introduce confusion into the Law. *Zimmern* v. *U. S.,* 298 U. S. 167, 169.

This Court has held the Judge had plenary power while the term was in existence to modify his judgment for error of fact or law or even revoke it altogether. *Zimmern* v. *U. S., supra,* 170.

The United States Circuit Court of Appeals decision rested upon the rule of practice which requires that after the expiration of the term of Court that the inadequacy of consideration must be accompanied by facts presented showing unfairness or impropriety in the sale or raising doubt as to the integrity of the sale.

Since the Circuit Court in its opinion properly held that a proceeding in bankruptcy from the time of its commencement to its conclusion is but one suit and that a

Court of Bankruptcy has no separate terms, hence the rules with respect to the want of power in a Court of equity to vacate a decree after the expiration of the term at which it was entered do not apply, but those rules apply only to the reasons for vacating judgments after the expiration of the term.

The Circuit Court of Appeals decision, in the case at bar, erroneously applied the practice applicable after the expiration of the term of Court when it should have applied the rule of practice that prevails giving the referee or judge plenary control of its judgments while term of Bankruptcy Court is still in effect as modified by Rule 60(b) of the Rules of Civil Procedure.

CONCLUSION.

The questions presented are of such importance in the administration of the Bankruptcy Act that this Court should grant certiorari. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and is in conflict with the decision of another Circuit Court of Appeals. The ruling of the United States Circuit Court of Appeals as to practice is erroneous and might tend to introduce confusion into the law.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

LOUIS R. GATES,
Counsel for Petitioner.

APPENDIX.

11 U. S. C. A. Sec. 94, Notices (Sec. 58 of the Act) reads as follows:

"Sec. 94. Notices (a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt or as afterward filed with the papers in the case by the creditors, of (1) all examinations of the bankrupt, if the court so directs; (2) all hearings upon applications for the confirmation of arrangements and wage-earner plans; (3) all meetings of creditors; (4) all proposed sales of property: *Provided*, That the court may, upon cause shown, shorten such time or order an immediate sale without notice; (5) the filing of all accounts of the receiver and trustee, for which confirmation is asked, and the time when they will be examined and passed upon; (6) the proposed compromise of any controversy in which the amount claimed by either party in money or value exceeds $1,000; (7) the proposed dismissal of the proceedings, in cases where notice is required by subdivision g of section 95 of this title and (8) all applications by receivers, ancillary receivers, marshals, trustees, and attorneys for compensation from the estate for services rendered, specifying the amount and by whom made: *Provided*, That where a creditors' committee has been appointed pursuant to this title, the notice required by clauses (1), (4), and (6) of this subdivision shall be sent only to such committee and to the creditors who have filed with the court a demand that all notices under this subdivision be mailed to them.

"(b) The court shall give at least thirty days' notice by mail of the last day fixed by its order for the filing of objections to a bankrupt's discharge (1)

to the creditors, in the manner prescribed in subdivision a of this section; (2) to the trustee and his attorney, at their respective addresses as filed by them with the court; and (3) to the United States attorney of the judicial district wherein the proceeding is pending. The court shall also give at least thirty days' notice by mail of the time and place of a hearing upon objections to a bankrupt's discharge (1) to the bankrupt, at his last known address as appears in his petition, schedules, list of creditors, or statement of affairs, or, if no address so appears, to his last-known address as furnished by the trustee or other party after inquiry; (2) to the bankrupt's attorney, if any, at his address as filed by him with the court; and (3) to the objecting parties and their attorneys, at their respective addresses as filed by them with the court.

"(c) All notices shall be given by the referee unless otherwise ordered by the judge. Any notice required by this title may be waived in writing by any person entitled thereto.

"(d) Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

"(e) The clerk shall mail to the Commissioner of Internal Revenue a certified copy of every order of adjudication forthwith upon the entry thereof. The court shall, in every case, mail or cause to be mailed a copy of the notice of the first meeting of creditors to the Commissioner of Internal Revenue and to the collector of internal revenue for the district in which the court is located. July 1, 1898, c. 541, Sec. 58, 30 Stat. 561; June 25, 1910, c. 412, Sec. 9 1/2, 36 Stat. 841; June 22, 1938, c. 575, Sec. 1, 52 Stat. 867."

Sec. 66-1124, G. S. Kans. 1943 Supp. reads as follows:

"66-1124. Fees due 15th of each month; failure to pay on said date. On or before the 15th day of each month, all motor carriers shall pay to the commission the amount of the fees due from them for the preceding month. If payment is not made on or before said date there shall be added a sum equal to one-twelfth of ten percent per month of the amount of the original fee: *Provided,* That with respect to all fees and penalties remaining unpaid at the effective date of this act all penalty in excess of a sum equal to one-twelfth of ten percent per month of the amount of the original fee is hereby canceled. Said fees and penalties not paid on said date shall constitute a lien upon all the personal property of the delinquent carrier, and also upon the vehicles of all persons leased by it in its business, and thereupon said property and vehicles may be held under warrant issued by the commission and may be sold in accordance with the law applicable to personal property taxes. In addition thereto, that the delinquency shall be a ground for the issuance of a writ of attachment by any court of record against the carrier, and for the suspension or revocation by the commission of the certificate, permit or license; said suspension or revocation may be ordered after a hearing by the commission held after a notice of not less than ten days to all parties interested. The commission shall enforce collection of all fees and penalties provided in this act, and daily remit to the state treasurer the proceeds thereof. (G. S. 1935, Sec. 66-1, 124; L. 1941, ch. 301, Sec. 1; March 27.)"

APR 11 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 977.

GEORGE S. ALLEN, TRUSTEE OF THE ESTATE OF ASH TRUCK LINES, INC., PETITIONER,

VS.

UNION TRANSFER COMPANY, A CORPORATION DOING BUSINESS AS UNION FREIGHTWAYS, RESPONDENT.

BRIEF OF RESPONDENT.

INGHRAM D. HOOK,
BERNARD T. HURWITZ,
JACK W. MARER,
Counsel for Respondent.

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BRIEF OF RESPONDENT.

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

On November 24, 1944, Ash Truck Lines, Inc., was adjudged a bankrupt in the District Court of the United States for the District of Kansas, First Division, and thereafter the matter was referred to the Honorable E. R. Sloan, Referee in Bankruptcy. The bankrupt filed its

schedules which, among other things, included a list of its creditors with their addresses and amounts owed to each. There were 240 creditors listed in the bankrupt's Statement of Affairs (2). Thereafter, the Referee caused a notice to be mailed to all creditors listed in the Bankrupt's Statement of Affairs at their respective addresses as listed or as afterwards filed with the papers in the case, which notice advised the creditors that the first meeting of the creditors would be held on December 18, 1944, at 10 o'clock at the office of the Referee in Topeka, Kansas, and that at that meeting, a trustee would be elected or appointed and the assets of the bankrupt sold at public auction (3 and 7). The notice complied in all respects with Section 58 a (4) of the Chandler Act (11 U. S. C. A. 94 a (4)) (17). The Referee also caused the notice to be published as provided by Section 58 (d) of the Chandler Act (11 U. S. C. A. 94 (d)) (18). On the day and at the time and place as stated in the published and the mailed notice, the first meeting of the creditors was held, at which time George S. Allen, of Topeka, Kansas, was elected trustee of the assets and estate of the bankrupt.

Watson Bros. Transportation Co., Inc., was one of the original petitioning creditors who filed the involuntary petition in bankruptcy against the bankrupt (16). This company was represented at the first meeting of creditors by its attorney, Carll Kretsinger, who was one of the attorneys for the petitioning creditors. After the transaction of other business, the trustee proceeded to offer the assets of the bankrupt at public sale. The public sale was conducted at the office of the Referee, in his presence and in the presence of all of the creditors there assembled. The only asset of any substantial value was the Certificate of Convenience and Necessity owned by the bankrupt, issued by the Interstate Commerce Com-

mission and permitting certain truck line operations between Omaha, Nebraska, and Kansas City, Missouri, and a conforming certificate, issued by the State Corporation Commission of Kansas. These certificates had been appraised prior to the sale by an appraiser appointed by the Referee, at the value of $7,500 (17). Union Transfer Company, the appellee, was the successful bidder for the price of $4,250. All creditors present approved the sale to the appellee (2 and 17). The Referee thereupon confirmed the sale (17). The appellee paid the purchase price in full within the time provided by the order of confirmation.

Under the terms of the contract of sale, appellee had six months within which to file applications with the Interstate Commerce Commission and with the Kansas State Corporation Commission for transfer of the Certificates of Convenience and Necessity (41).

While the appellee was in the course of the preparation of those applications, including applications for temporary operating rights, and on or about January 6, 1945, one Ed Mays deposited $6,250 with the trustee as a firm bid for the Interstate and Intra-state operating rights purchased by the appellee if that sale should be set aside (18). After the filing of this bid, the trustee declined to execute the applications to transfer to appellee these operating rights, which applications to transfer were necessary for filing with the Interstate Commerce Commission and the Kansas State Corporation Commission before the appellee could secure any operating rights.

On January 27, 1945, the Consolidated Builders Supply Company, with a claim of $9 (56) and the J. I. Case Company, with a claim of $22.60 (56) filed separate applications to set the sale to the appellee aside. The application of the J. I. Case Company is identical with that of Consolidated Builders Supply Company except as to

dates, amounts and considerations (10). Both companies were represented by the same attorney. The application of the Consolidated Builders Supply Company, with the exception of caption, is set out in full on pages 8, 9 and 10 of the transcript. The grounds alleged in the application for the setting aside of the sale are (1) that the applicant received no notice of the sale and (2) if the sale were set aside at least $6,250 would be realized from the sale. These applicants were not listed by the bankrupt in its schedules as creditors and hence received no mailed notice of the first meeting of the creditors (18). On January 31, hearing was had on these applications and on the basis thereof, the confirmed sale to the appellee was set aside, the bidding reopened and Watson Bros. Transportation Co., Inc., became the successful bidder at the resale for $9,050.

Appellee filed a timely Petition for Review (24 to 32). This petition was sustained by the Honorable Walter A. Huxman (Judge of the United States Court of Appeals, for the 10th Circuit, but assigned as District Judge) on April 7, 1945, and the order of the Referee of January 31, 1945, setting aside the sale to the appellee and reselling the property to Watson Bros. Transportation Co., Inc., was vacated and set aside and the original sale to the appellee was approved and reinstated. Judge Huxman made various findings of fact and conclusions of law (51 to 54), and, in addition, wrote an opinion (55 to 59).

While Judge Huxman adopted the findings of fact made by the referee, it is doubtful if he intended to adopt referee's finding of fact No. 12, with respect to gross inadequacy of price, for in his opinion (R. 57), he says:

> "The referee found, upon considering the petition to set this sale aside, that the bid at the original sale was grossly inadequate. But he failed to find

that there were any suspicious circumstances in the conduct of that sale. He considered the sale upon the question of confirmation. He knew then that the appraised price was $7,500 and that the bid price of $4,250. He asked the creditors if anyone had any objection to the confirmation of the sale and none had. The order of confirmation recites that all creditors present unanimously approved the sale. From this, one must conclude that at that time and viewed in the light of circumstances as they existed there, everyone thought that the sale for $4,250 was an advantageous sale and cne which everybody believed should be confirmed and put through. From that we must conclude that at that time no one considered the sale price grossly inadequate. Certainly, if the creditors had thought so, they would have objected, and if the court had felt that it was grossly inadequate he would, as he had the right to do, have refused to confirm the sale. It must follow that the only basis for the referee's subsequent finding that the price was grossly inadequate must be that at that time he was informed that if a sale now were held, a bid of at least $6,250 would be secured. Does this justify the conclusion that the original sale was for such a grossly inadequate price as to shock the conscience of the court? The answer is that it does not. Everyone recognizes that inadequacy of price alone is not grounds for setting aside a sale. It follows that the fact that now it is apparent that a higher price could be obtained is likewise no grounds for setting aside the sale, neither is it grounds for concluding that the original price was grossly inadequate."

On appeal to the Circuit Court of Appeals for the Tenth Circuit, the District Court was affirmed.

II.

JURISDICTION.

The jurisdiction of this Court to entertain the petition for a writ of certiorari is admitted by the respondent.

III.

QUESTIONS PRESENTED.

Respondent denies that the statement of the questions as found in Section III of the petition, is correct or that the questions as stated have been, or are now, in the case. The simple question which confronted the referee, the District Court and the Court of Appeals, was this: *"May a referee in bankruptcy, after a valid sale made to the highest bidder for* $4,250, *which sale was approved by all of the creditors present and was confirmed by the referee, set aside that confirmed sale forty days later, upon a mere showing that if the confirmed sale is set aside, the property sold will bring at least* $6,250, *in the absence of a showing of fraud, collusion, accident, mistake or some other substantial defect for which equity would avoid a sale between private parties?"*

IV.

REASONS FOR DENYING WRIT.

1.

Respondent will take up and consider the reasons assigned by the petitioner for granting the writ in the order in which they appear in the petition.

(a) *Langnes* v. *Green,* 282 U. S. 531. This case is cited by the petitioner because in the course of the opinion, this Court had occasion to define the word "discretion." The discretion there involved was a discretion vested in the District Court to determine whether or not it would entertain jurisdiction of a proceeding. Respondent has no disagreement with the definition therein contained, but admits its complete inability to recognize wherein the cited case, or the definition contained therein, bears

the slightest resemblance to a conflict with the opinion of the Circuit Court of Appeals in the instant case.

(b) *Graffam* v. *Burgess,* 117 U. S. 180. In this case, property worth $10,000 or $11,000 was sold for a judgment of $28.95 and costs of $16.15. In addition to this shocking inadequacy of price, there was also proof of actual fraud in both the procurement of the judgment and in the circumstances of the sale. There can be no possible conflict between this case and the opinion of the Court of Appeals in the instant case.

(c) *Gelfert* v. *National City Bank,* 313 U. S. 221. This case involved the constitutionality of a foreclosure law of the State of New York, and in no way involved a sale under the bankruptcy law. The rule stated in this case was expressly followed by the Circuit Court of Appeals as will be observed from the marginal citation of the case in the Court's opinion (R. 68).

2.

Currin v. *Nourse,* 66 F. 2d 137. There is not the slightest similarity between the facts in the instant case and the facts in the cited case, and there can be no possible conflict. In *Currin* v. *Nourse,* the successful bidder submitted a long and involved contract in connection with his bid. The referee confirmed the sale to the bidder without allowing, and even refusing, to permit the common creditors to examine and analyze the contract in order to determine what benefits, if any, would accrue to them under the terms of the sale. Without an examination of this long and complicated contract, no common creditor could have the slightest notion of what the sale meant insofar as he was concerned. The arbitrary refusal of the referee to permit the common creditors to examine the contract, was, of course, an abuse of discretion, and the

Eighth Circuit quite properly held that the conduct of the referee was an act of oppression and constituted a challenge to the integrity of the sale.

3.

None of the cases cited by the petitioner under this heading have any bearing upon the question presented. It is submitted, however, that the law applicable to the facts in the case at bar has been long established, and the various district courts and circuit courts of appeal, without exception, have followed the universal rule. The statement of the rule is probably most aptly worded in *Morrison* v. *Burnette*, 154 Fed., p. 617 (l. c. 624):

> "But there is a marked and radical distinction between the situations, the rights of the parties, and the established practice before and after the confirmation of the sale. The purchaser bids with full notice that the sale to him is subject to confirmation by the court and that there is a power granted and a duty imposed upon the judicial tribunal when it comes to decide whether or not a sale shall be confirmed to so exercise its judicial power as to secure for the owners of the property the largest practicable returns. He is aware that his rights as a purchaser are subject to the rational exercise of this discretion. But after the sale is confirmed that discretion has been exercised. The power to sell and the power to determine the price at which the sale shall be made has been exhausted. From thenceforth the court and the successful bidder occupy the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties. Hence the rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake or

some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids (citing cases).

"This rule is so firmly established that it is no longer debatable, and the cogent and all-sufficient reason for it is that judicial sales would become farces, and rational men would shun them and refuse to bid, if after the confirmation unsuccessful bidders or dissatisfied litigants could avoid them and secure new sales by offers of higher prices, when they thought the purchase a fortunate one, and thus secure the profits in that event, and leave the buyer to suffer the losses if the property depreciated in value or the purchase was unwise. No doubt remains regarding the proper decision in this case. The sale to appellants was made on notice. The appellee, the Laurel Oil & Gas Company, made an unsuccessful bid at that sale. The lease to the appellants was executed, and they paid the amount of their bid to the court or its representative, more than three months before the sale was confirmed. The sale was confirmed, after notice, over objections, and after a full hearing. There was no fraud, no mistake, no surprise, no accident, no equitable ground for setting it aside. There was not even evidence that the purchase price was inadequate at the time of the sale. There was nothing but the mere fact that an unsuccessful bidder in March, who failed to offer more until after the sale was confirmed in June, suddenly became anxious to pay more than $5,000 above the price it had offered in March. The natural inference is that this property, which is of a speculative nature, had appreciated in value between the day of the sale and the day when this offer was made. If so, the purchaser who made the highest bid before the confirmation and paid the representative of the court the amount of it, and not the lower bidder, who paid nothing, was, after the confirmation, entitled upon every equitable principle to the benefit of the appreciation."

It should be noted that the court, in the Morrison case, expressly grounds its opinion and decision upon two Supreme Court cases cited by the petitioner (*Ballentyne* v. *Smith,* 205 U. S. 285; *Grajjam* v. *Burgess,* 117 U. S. 180). The Morrison case has been the leading case, universally followed ever since its rendition. The text book writers on bankruptcy have recognized the universal adoption of the rule in the Morrison case. The rule is stated thus in Collier on Bankruptcy, 14th Edition, Volume 4, Section 70.98, pages 1581 and 1582:

> "The setting aside of a sale is different from both the denial of confirmation and the reversal on review or of an appeal from an order of confirmation. It presupposes an otherwise complete sale—that is, normally, a sale that requires confirmation and has been duly and definitely confirmed. Its function is one of strictly equitable jurisdiction, namely to avoid a sale, public or private, that is tinged with fraud, error or similar defects which would in equity affect the validity of any private transaction. Naturally, such defects would equally justify the denial of confirmation. But proceedings to 'set aside' a sale offer an opportunity to attack on the grounds mentioned a sale already finally confirmed unless the particular defect alleged was examined in the confirmation proceedings and was held to be without merit, in which case the principle of *res judicata* would apply. Proceedings to set aside are not a second edition of the confirmation proceedings. They cannot be set in motion for reasons other than the defects of such gravity as to 'shock the conscience of the chancellor,' and even irregularities of the most serious kind that might have been, but were not, asserted in the confirmation proceedings are definitely lost and cannot be used as a ground for the request to set aside."

Remington on Bankruptcy states the rule as follows (Remington on Bankruptcy, Fourth Edition, Volume 6, Section 2569, page 60):

"After a sale has been confirmed, it can be vacated for cause, but slight cause will not suffice.

"The confirmation of the sale does not vest the legal title in the purchaser, but does vest in him the full equitable title. Before confirmation the trustee's sale is not a sale in a technical or legal sense, for, until confirmation, an accepted bidder is merely a preferred proposer or offerer; after confirmation, however, the case is different, and the confirmation cannot be vacated merely for inadequacy of price, but only for fraud, accident, mistake or some other cause for which equity would avoid a like sale between private parties."

The above stated rule was expressly followed by the District Court as will be noted by reference to the Morrison case in the Court's opinion, and the Circuit Court of Appeals expressly followed the rule as embodied in a recent Tenth Circuit decision (*Webster* v. *Barnes Banking Co.*, 113 F. 2d 1003) (R. 68).

There can be no question but that the rule has been correctly applied to the facts in the instant case. Certiorari, therefore, should not be granted unless this Court feels that it is in the public interest that the rule should be reexamined. Respondent feels that the continuance of the doctrine as embodied in the rule is most necessary to the orderly conduct of sales in bankruptcy. Sales in bankruptcy are an indispensable part of the machinery employed in administering bankruptcy estates and public policy requires stability in such sales. To induce bidding at such sales and reliance upon them, the purpose of the law should be that they shall be final and not be disturbed except upon such a showing as would justify a Court of Equity in setting aside a sale between private parties.

4.

Zimmern v. *U. S.*, 298 U. S. 167, 169. We have no quarrel with the rule in this case, and, as pointed out by the petitioner, the Circuit Court in its opinion held that there was no want of power or jurisdiction in the referee to set aside the sale. As stated by the Circuit Court (R. 67):

> "A court of bankruptcy is a court of equity. A proceeding in bankruptcy from the time of its commencement by the filing of the petition until the final settlement of the estate of the bankrupt is but one suit. A district court, for the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. The rule that a court may not vacate at a subsequent term an order made at a prior term has no application to a proceeding in bankruptcy. Proceedings in a bankruptcy suit at any time prior to its determination are open for reexamination upon application therefor in appropriate form; and any order made in the progress of the proceedings may be set aside and vacated upon proper showing made."

But the mere fact that a court has jurisdiction or power over its decrees does not mean that it can arbitrarily, or, without proper cause, set aside a valid decree previously entered. The exercise of power over its decrees by the court, must be dependent upon grounds and reasons which are advanced and, as stated by Judge Huxman in his opinion (R. 59), "which would be sufficient in an independent action to set aside the judgment." There can, therefore, be no possible confusion or conflict between the rule announced in the cited case and the bankruptcy rule announced by the Circuit Court in this case and its application of that rule to the facts.

CONCLUSION.

Much is said in the brief of the petitioner with respect to the rights of creditors and the obligation of the referee to protect those rights. It should be noted that in this case, all of the creditors present at the sale to respondent approved that sale and urged its confirmation. At that time, both the referee and the creditors believed the sale was advantageous. There was not the slightest hint or suggestion of fraud, collusion, accident or mistake nor any other grounds which would justify a Court of Equity in setting aside a sale between private parties. In this admitted state of the record, the finality and stability of confirmed sales in bankruptcy assumes a weight in the balance of interests, which tips the scales decisively. The rule followed and applied by the Circuit Court of Appeals in this case has been extant for seventy-five years and has been universally followed by district courts and circuit courts of appeal everywhere. There is a public interest in the continuance of a good rule and there is a public disservice and confusion in the reversal or abridgement of it.

It is respectfully submitted that certiorari should be denied.

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